

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 14, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0614

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

DAVID L. WILLIAMS,

Plaintiff-Appellant,

v.

PATRICIA GARRO,
WILLIAM TURNER,
RONALD TORSELLA,
GREGORY GRAMS, and
GARY MCCAUGHTRY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Dane County:
GEORGE A. W. NORTHRUP, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. David Williams, a *pro se* inmate, appeals from a judgment dismissing his complaint against five officers and employees of the

Waupun Correctional Institution (WCI). The issue is whether Williams's complaint states a cause of action against the respondents under 42 U.S.C. § 1983. We conclude that it does not and therefore affirm.

WCI officials charged Williams with possessing intoxicants, a violation of WIS. ADM. CODE § DOC 303.43. A disciplinary committee found him guilty and imposed punishment. That decision was affirmed on administrative appeal. Williams then commenced this action alleging, among other things, that his due process rights were violated when the committee found him guilty and imposed punishment without any evidence that he committed the charged violation. He appeals the trial court's holding that this allegation does not state a claim under 42 U.S.C. § 1983.

In determining whether a complaint states a cause of action we assume that all the pleaded facts are true. *Irby v. Macht*, 184 Wis.2d 831, 836, 522 N.W.2d 9, 11, *cert. denied*, 115 S. Ct. 590 (1994). We resolve the issue as a matter of law, without deference to the trial court's decision. *Id.*

Under *Irby*, random and unauthorized procedural due process violations during a prison disciplinary proceeding are not actionable under 42 U.S.C. § 1983. *Id.* at 835-36, 522 N.W.2d at 10-11. Williams acknowledges that under *Irby*, the disciplinary committee's unsupported decision was a random and unauthorized act, in violation of WIS. ADM. CODE § DOC 303.76(6). ("The institution is required to establish guilt by a preponderance of the evidence.") However, he contends that because the committee's act was a substantive due process violation, rather than a procedural lapse, the *Irby* holding does not preclude his claim.

We disagree. Substantive due process provides protection against "certain arbitrary, wrongful government actions `regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 115 (1990) (quoted source omitted). However, neither the Wisconsin nor the United States supreme court has chosen to include the wrong alleged here in that category of government actions. Instead, the requirement that evidence support a prison disciplinary decision has been deemed an element of procedural due process by the United States Supreme Court in *Superintendent, Mass. Correctional Inst. at Walpole v. Hill*, 472 U.S. 445, 454 (1994), and by the

Wisconsin Supreme Court in *Irby*, 184 Wis.2d at 845, 522 N.W.2d at 15. That resolves the issue.

Williams also contends that his allegation that he was disciplined without evidence of guilt states a claim under the Eighth Amendment ban on cruel and unusual punishment. He did not present that argument to the trial court and we therefore deem it waived. *Wirth v. Ehly*, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145-46 (1980).

Finally, Williams argues that *Irby* was wrongly decided. That argument must be directed to a higher court, as we cannot overturn supreme court precedent. *Livesey v. Capps Corp.*, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979).

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.